LIBRARY
SUPREME COURT, U. S.

NO. 731

OCT 16 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, A. D., 1967

IN RE: CLAY S. CROUSE, Petitioner
and
JOHN W. GARDNER, Secretary of Health, Education and Welfare, Intervenor
(Hamilton v. Celebrezze, Beckley Civil Action No. 264)
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CLAY S. CROUSE,
Petitioner and Member of the Bar of the Supreme Court of the United States
Heaberlin Building
Beckley, West Virginia

LEE M. KENNA, Of Counsel
808 Security Building
Charleston, West Virginia

INDEX

		Page
I.	Prior Opinions	1
II.	Jurisdictional Statement	2
III.	Questions Presented for Review	2
IV.	Statement of the Case	3
V.	Argument	7
	Prayer	20

Appendix

	Appendix No.	
Factual Statement relative to matters prior to institution of the Case of Crouse vs. Hamilton in the Circuit Court of Raleigh County, West Virginia, dated May 22, 1964	1	21
Order to Show Cause, dated April 28, 1964	2	25
Argument before the District Court, dated May 14, 1964	3	29
Memorandum Opinion of United States District Court, dated October 25, 1965	4	42
District Court Order of January 10, 1966	5	47
Letter Opinion by Judge of United States District Court, dated October 5, 1966	6	48

	Appendix No.	Page
Final Order of United States District Court, dated January 19, 1967	7	51
Opinion of Circuit Court of Appeals for the Fourth Circuit, dated July 18, 1967	8	54

TABLE OF CITATIONS

28 U.S.C. §1259 2

28 U.S.C. §2283 7

42 U.S.C. §406 (b) ..... 3 fn., 13, 15

Baltimore & Ohio Southwestern Railway Co. v. *Voigt*, 176 U.S. 498, 44 L.Ed. 18

Carroll v. *Celebrezze*, (N.D. Iowa-1964) 228 F. Supp. 24 18

Castille v. *Sect. of Health, Education & Welfare*, (W. D. La.-1965) 238 F. Supp. 340 ..... 15, 18

Folsom v. *McDonald*, (CA 4-1956) 237 F.2d 380 13

German v. *Univ. Oil Products Co.*, (CA 8) 77 F.2d 70 11

Gonzalez v. *Hobby*, (CA 1-1954) 213 F.2d 68 13

Grant v. *Fletcher*, (D.C.Mich.) 283 F. 243 14

Gray v. *Brunetti Const. Co.*, (CA 3) 266 F.2d 809 14

In re Debbins, (E.D.Mich.-1931) 53 F.2d 1018 11

Jeffries v. *Laurie*, (E.D.Mo.-1805) 23 F. 786 12

Muller v. *Kelly*, 116 F. 545, rev. 125 F. 212 14

Page

Muscarelle v. *Central Iron Mfg. Co.*, (CA 3-1964) 328 F.2d 791 8

Oklahoma Packing Co. v. *Oklahoma Electric & Gas Co.*, 309 U.S. 4, 84 L.Ed. 537 7

Ponzi v. *Fessenden*, 285 U.S. 255, 66 L.Ed. 607 8

Re Gilbert, 276 U.S. 61 and 294, 72 L.Ed. 441 and 580 12

Rob[illegible]n v. *Pettery*, (1933) 114 W. Va. 78, 170 [illegible] 901 15

Ryan v. [illegible]*delphia & Reading Coal, etc. Co.*, 189 F. [illegible] 14

Ruck v. *Spring Cotton Mills*, (D.C.N.C.) 120 F. Supp. 944 10

Sperry Rand Corp. v. *Rothlein*, (CA 2-1961) 288 F.2d 245 8

Strickland v. *Sellers*, (D.C.Tex.) 78 F. Supp. 274 10

Theard v. *United States*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed. 2d 1342 12

Toucey v. *N. Y. Life Ins. Co.*, 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967 8

U.S. v. *Call*, (CA 5-1923) 287 F. 520 14

Woodbury v. *Jergens*, (CA 2-1934) 69 F.2d 49 11

36 C.J.S., Fed. Courts §13(1) and (2) 10

Cyc. of Fed. Prac. §2.017 14

MacKinnon, F. B., *Contingent Fees for Legal Services*, 1964, Aldine Publishing Co., Chicago, Ill. 16

NO._____

IN THE

Supreme Court of The United States

October Term, A. D., 1967

IN RE: CLAY S. CROUSE, Petitioner
and
JOHN W. GARDNER, Secretary of Health, Education and Welfare, Intervenor
(Hamilton v. Celebrezze, Beckley Civil Action No. 264)
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: The Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. PRIOR OPINIONS:

Neither the opinion of the Circuit Court of Appeals for the Fourth Circuit or the District Court's memorandum decisions have been reported to date. The Circuit Court of Appeals' opinion merely states "For

reasons sufficiently appearing in the memorandum decision of the District Court, the judgment is affirmed." (Appendix No. 8) The District Court opinions are appended hereto as Appendix Nos. 4 and 6.

II. JURISDICTIONAL STATEMENT:

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was dated and entered July 18, 1967. The statutory provision believed to sustain the jurisdiction of this court is Section 1254 of Title 28 of the United States Code. The questions presented are of public importance since they involve the appropriate relationship between the federal and state courts, as well as the relationship between federal courts and the attorneys practising before them. The judgment of the circuit court of appeals has sanctioned such a departure by the district court from the accepted and usual course of the judicial proceedings as to call for the exercise of this court's power of supervision.

III. QUESTIONS PRESENTED FOR REVIEW:

A. Whether a District Court may or should on its own motion enjoin an attorney practising before it from collecting by action instituted in 1968 before an appropriate state court, fees for services rendered before the District Court in a Social Security review, final judgment in which had been fully paid by HEW prior to the institution of the state action.

B. Whether a District Court may or should by such injunction impose its own judgment as to the

amount of attorney's fees to be charged in contradiction of the terms of a contingent fee contract entered between the attorney and an adult client, relative to a Social Security review by the District Court which had been completed and fully paid prior to the passage of 42 U.S.C. 406(b) in 1965.*

IV. STATEMENT OF THE CASE:

This action arose as a summary proceeding instituted by the Judge of the United States District Court for the Southern District of West Virginia upon an order to show cause served upon the petitioner Crouse, an attorney at law practising before that court. (Appendix No. 2) The respondent was allowed to intervene without objection by petitioner after a final decision by the Judge of the District Court. There are no known disputes of material fact.

Prior to October 1958, one Hamilton, a resident of Raleigh County, West Virginia, as is Crouse, had

---

*On July 30, 1965, Pub. L. 89-97, Title III §332, 79 Stat. 403 added subsection (b) (1) and (2) to 42 U.S.C. §406 as follows:

"(b) (1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 per cent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405 (i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

"(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable to any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both."

applied for benefits under the Social Security Act but had been turned down by HEW on three separate occasions at its lowest level and once again by its appeal council. Hamilton thereupon asked petitioner to represent him, his wife and two children, in an appeal from the administrator's ruling to the Federal District Court. Hamilton and Crouse agreed that Crouse would bring suit for and otherwise handle the claims of Hamilton, his wife and children in the United States District Court and, if necessary, before the Circuit Court of Appeals, for a contingent fee of fifty per cent (50%) of the initial payments received, if any. The value of future payments, if any, to be received by the parties under the sought for award was not a part of the base to which the percentage was to apply.

Petitioner brought suit on February 3, 1961, in the District Court for the Southern District of West Virginia in an action entitled *Clarence Hamilton* v. *Anthony Celebrezze, etc.*, Beckley Civil Action No. 264. Briefs were filed and arguments presented in June of 1961, and on April 19, 1963, the District Court awarded Hamilton accrued benefits of $6,582.00, plus $116.00 per month for life, and to him for his two children accrued benefits of $5,432.00, plus monthly benefits of $58.00 each per month until each should arrive at the age of eighteen (18) years. Hamilton's wife was awarded accrued benefits of $1,962.00 but died before benefits were paid to her. The amounts paid her estate form no part of the base upon which Crouse's claim is computed. Between argument and the District Court's decision, Hamilton's curiosity, need and personality caused Crouse material concern and expenditure of time. (See App. No. 1) Two

months after the District Court's decree, the accrued benefits for Hamilton and children were paid Hamilton in full and deposited in bank, who thereupon refused to pay Crouse the agreed fee.

On July 10, 1963, Crouse instituted suit in the Circuit Court of Raleigh County, West Virginia, against Hamilton and the infant children asking for attorneys fees in the sum of $6,070.00, representing fifty per cent (50%) of the accrued benefits received by them. The action in the state court proceeded in regular manner with the appointment of a guardian *ad litem*, the filing of answers in behalf of Hamilton and the guardian *ad litem*, a pretrial conference during which the issues raised by the pleadings were stated, and a jury trial at the end of which the state court judge directed a verdict, on April 21, 1964, for Crouse against Hamilton in the sum of $3,291.00, but removed from the jury and reserved for judgment by the court, to be based upon further evidence, the extent and value of Crouse's services to the infants.

At this point the Judge of the United States District Court for the Southern District of West Virginia entered an order dated April 28, 1964, not in the matter styled *Hamilton* v. *Celebrezze, etc.* which had originally been pending before him, but as a new proceeding styled *In Re*: *Clay S. Crouse*, Civil Action No. 3033 (*Hamilton* v. *Celebrezze*, Beckley Civil Action No. 264), which summarized the events recited above, 'found' that the fee which Crouse was seeking to collect was "unreasonable on its face and * * * contrary to the purposes of the Social Security Act and the administration thereof" and directed Crouse to appear on May 14, 1964, "to show cause why the

United States District Court should not enter an order enjoining (Crouse) from collecting the fee demanded of Hamilton * * *" etc. (App. No. 2)

Crouse moved to dismiss the order to show cause on the grounds that it failed to state a matter over which the United States District Court had jurisdiction and because the order clearly showed that another action upon the same cause, which had been instituted prior thereto in the Circuit Court of Raleigh County, West Virginia, was still pending. After argument upon the motion, the District Court issued a written opinion on October 25, 1965, (App. No. 4) to the effect that it had jurisdiction of the cause and should exercise its authority in spite of the pendency of the action before the Circuit Court of Raleigh County, West Virginia. An order was thereupon entered on the 10th day of January, 1966, setting the matter for hearing. An application to the Circuit Court of Appeals for the Fourth Circuit for a writ of prohibition against the District Court was denied on April 25, 1966.

A hearing was subsequently held before the District Court at which Crouse presented no evidence but argued only the question of an earlier action pending, resulting in a second letter opinion dated October 5, 1966, (App. No. 6) and an order entered January 19, 1967, (App. No. 7) in which the District Court purported to "award" Crouse an attorney's fee in *Hamilton* v. *Celebrezze*, Civil Action No. 264, in the sum of $1,645.50 in full satisfaction of all services rendered by Crouse in that case and ordering Crouse to "remit to the said Clarence Hamilton any amount in excess of said amount of $1,645.50 which he might otherwise obtain by virtue of the judgment or proceeding in

Civil Action No. 1625 in the Circuit Court of Raleigh County, West Virginia."

An appeal to the United States Court of Appeals for the Fourth Circuit instituted January 25, 1967, resulted in an affirmation of the District Court's judgment "for reasons sufficiently appearing in the memorandum decision of the District Court * * *" on July 18, 1967. (App. No. 8)

V. ARGUMENT:

The powers of United States Courts are properly broad in many respects but limited in others. The many faceted relationship between the federal court system and the various state court systems is of great importance to the general welfare of the people of the United States—in lesser degree, so is the relationship between federal courts and their attorneys. Public welfare requires the faithful and consistent application of rules established for the conduct of these relationships.

The Congress has enacted:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or execute its jurisdiction." 28 U.S.C. §2283

Injunctions against litigants in state courts have been held violative of the statute as much as injunctions against state courts themselves. *Oklahoma Packing Co.* v. *Oklahoma Electric & Gas Co.*, 309 U. S. 4, 84

L.Ed. 537; *Muscarelle* v. *Central Iron Mfg. Co.* (CA 3-1964) 328 F.2d 791; *Sperry Rand Corp.* v. *Rothlein* (CA 2-1961) 288 F. 2d 245.

As stated in *Toucey* v. *N. Y. Life Ins. Co.*, 62 S. Ct. 139, 314 U. S. 118, 86 L.Ed. 100, 137 A.L.R. 967:

> "The guiding consideration in the enforcement of the Congressional policy was expressed by Mr. Justice Campbell, for the court, in *Taylor* v. *Carryl*, 20 How. (US) 583, 597, 15 L.Ed. 1028, 1032:
>
> " 'The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision.'
>
> "We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation."

This court has put the problem and the accepted solution well in *Ponzi* v. *Fessenden*, 258 U. S. 255, 66 L.Ed. 607, at page 661, as follows:

> "We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfill their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and

things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure."

* * *

"The chief rule which preserves our two systems of courts is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. The principle is stated by Mr. Justice Matthews in *Covell* v. *Heyman*, 111 U.S. 176, 28 L.Ed. 390, 4 Sup.Ct.Rep. 355, as follows:

" 'The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty.'

"The *Heyman* case concerned property, but the same principle applies to jurisdiction over persons, as is shown by the great judgment of

Chief Justice Taney in *Ableman* v. *Booth*, 21 How. 506, 16 L.Ed. 169, quoted from and relied upon in *Covell* v. *Heyman*."

In the instant case, on the date action was instituted before the Circuit Court of Raleigh County, West Virginia, the Social Security appeal proceeding had been terminated by full payment of the District Court's award. The jurisdiction of the District Court ancillary to its jurisdiction to hear the main cause, by virtue of which it might have fixed and awarded attorneys fees in *Hamilton* v. *Celebrezze*, was at an end. 36 C.J.S., Fed. Courts §13 (1) and (2).

In *Ruck* v. *Spring Cotton Mills*, (D.C.N.C.) 120 F. Supp. 944, a stockholder who had sued to compel payment of dividends subsequently settled the action without consulting his attorneys, who withdrew and intervened seeking to recover for their services, primarily against the stockholder and secondarily against the corporation. The District Court held that intervenors' action was an independent proceeding and not one in which the court had ancillary jurisdiction as asserted by intervenors.

In *Strickland* v. *Sellers* (D.C. Tex.) 78 F. Supp. 274, plaintiff and his attorney had entered a one-third contingent fee contract, the main cause of action was settled by agreement and attorney sought judgment for fees by ancillary proceeding. The District Court held that the contingent fee contract could not be construed as an assignment of a part of plaintiff's claim and that the attorney had insufficient interest to uphold ancillary jurisdiction after settlement of the main cause.

In *Woodbury* v. *Jergens*, (CA 2-1934) 69 F.2d 49, where under local law the attorney of record had a charging lien for his fees against his client's recovery, the court held that after settlement of the action, even after final decree, but only until full payment, the court had ancillary jurisdiction to determine a controversy over the attorney's fee.

In *German* v. *Univ. Oil Products Co.*, (CA 8) 77 F. 2d 70, a suit had been settled between the parties but no order had been entered, when an attorney of record applied to the court for an award of attorney's fees. The court of appeals held that the main action was dead and that the court's ancillary jurisdiction to determine attorney's fees arising out of it had also terminated, stating, on page 72, that:

> " * * * Such an original suit or action is indispensable to the maintenance of a dependent suit * * * without such a dependent [sic] cause of action (the Court) has no jurisdiction in equity, and in the absence of diversity of citizenship or a Federal question, it can grant no relief."

In the instant case, the District Court found that it had *independent*, rather merely than ancillary, jurisdiction "* * * in the exercise of its general authority over the professional conduct of its attorneys, as officers of the court, towards their clients, * * * to deal summarily with the situation here presented." (Mem. Op. October 25, 1965, App. No. 4)

In re Debbins (E. D. Mich. 1931) 53 F.2d 1018, cited by the District Court in support of its opinion holds that the District Court there had jurisdiction by summary proceeding to require an attorney to

return exhorbitant fees charged a bankruptcy estate, but involved no prior state action.

Theard v. *United States*, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed. 2d 1342, from which the District Court quotes to support its position that it was free to so deal with an attorney independently of considerations for the state court system (Mem. Op. October 25, 1965, App. No. 4) involved a disbarment proceeding against a Louisiana attorney on the ground simply that he had been disbarred already by the Courts of Louisiana. *Theard* held that the two judicial systems were separate, had separate though similar requirements for attorneys and that disbarment by state courts was not *ipso facto* reason for disbarment by federal courts. *Theard* also did not involve the matter of a prior action pending in a state court involving the same subject.

The few cases which deal directly with the subject of the summary jurisdiction of courts over their attorneys, *supra*, and *Re Gilbert*, 276 U. S. 61 and 294, 72 L.Ed. 441 and 580; *Jeffries* v. *Laurie*, (E.D.Mo. 1805) 23 F. 786, appear to sanction its exercise to correct overreaching or reprehensible conduct on the attorney's part; whereas other cases, such as *German*, *Ruck* and *Strickland*, *supra*, seem to deny attorneys the benefit of the federal forum unless the matter of fees is brought up prior to termination of the main cause or if there is diversity or some other ground of original federal jurisdiction.

In the instant case, after Hamilton had been fully paid and had refused to pay petitioner's fee, what should petitioner have done? The District Court's

Memorandum Opinion of October 25, 1965 (App. No. 4) suggested that "Crouse could have asked this court for the allowance of a reasonable fee in this case. This forum was not only available for that purpose but legally the most appropriate forum." It is readily admitted that the District Court was familiar with the Social Security review and with much of petitioner's part in it, but unfortunately for Crouse at this time, the District Court no longer had control of a fund from which petitioner's fees could be paid, nor any personal jurisdiction over Hamilton upon which a personal judgment against him could be based. Since there was no diversity of citizenship between Crouse and Hamilton, or his children, an independent action could not have been brought in the Federal District Court. Re-opening the Social Security review proceedings on petitioner's motion might well have been refused, on grounds of termination of ancillary jurisdiction expressed in *German*, *Ruck*, *Strickland*, and *Woodbury*, *supra*.

Or the District Court may have followed other courts which had in the past held that they had no authority to determine a fee where no application was made for award of payment from funds before the court, *Gonzalez* v. *Hobby*, (CA 1-1954) 213 F.2d 68 (Compare *Folsom* v. *McDonald* (CA 4-1956) 237 F.2d 380). On the other hand, an action at law on contract clearly lay in the Circuit Court of Raleigh County, West Virginia. In terms of certainty of remedy this was clearly the most appropriate forum.

The question then arises whether prior to the passage of 42 U.S.C. 406 (b) in 1965 a 50% contingency fee contract in a Social Security review was so "un-

reasonable on its face" or so reprehensible as to outweigh the rule of non-interference between federal and state courts which one source has said is a principle of "* * * more than mere forebearance (but) is a principle of right and law and necessity." Cyc. of Fed. Prac. §2.017. We believe the answer is, clearly no.

The contract was, of course, unenforceable and meaningless as to the infants; the District Court's opinions recognized that the state court was in the process of scheduling hearings as to the reasonableness of charges to be made against them. On the other hand, contingent fee contracts with competent adults have long been recognized and upheld by courts generally. *U.S.* v. *Call*, (CA 5-1923) 287 F. 520.

In *Gray* v. *Brunetti Const. Co.*, (CA-3) 266 F(2d) 809, it was held that under New Jersey law, attorney-client contracts for contingent fees should not be carved away by the court, except in an entirely clear case and, where there has been performance by the attorney, the contract ought not to be disturbed in the absence of unfairness or fraud. In *Muller* v. *Kelly*, 116 F. 545, reversed on other grounds at 125 F. 212, the court held that where a contract to pay an attorney a contingent fee for his services in a suit is valid under the law, and no claim is made that such a contract was obtained by unfair means, it is binding as to the proportion of the recovery agreed to be paid.

Federal courts have found fifty per cent (50%) contingent fee contracts entirely proper in *Grant* v. *Fletcher*, (D.C.Mich.) 283 F. 243, and *Ryan* v. *Philadelphia & Reading Coal, etc. Co.*, 189 F. 253, and

the West Virginia Supreme Court of Appeals recognized the validity of a fifty per cent (50%) contingent fee contract with an adult client in *Robertson* v. *Pettery*, (1933) 114 W. Va. 78, 170 S.E. 901.

In *Castille* v. *Sect. of Health, Education & Welfare*, (W.D.La.-1965) 238 F.Supp. 340, the District Court refused to review a 50% contingent fee contract at the request of the Secretary where the claimant was satisfied, holding that attorney's fees in Social Security cases before the passage of 42 U.S.C. 406 (b) in 1965 were matters of contract between competent adults, and distinguished cases in which the courts had supervised fees in the absence of express agreements.

Parenthetically it should be noted that 50% of the initial recovery in Social Security cases is a far cry from 50% of the value of the entire recovery. In the instant case it requires little calculation to determine that 50% of the initial recovery represents approximately 14% of the total which Hamilton and children will receive if he lives his life expectancy of 15 years and if both children live to reach 18 years of age.

It is also noteworthy that here in fixing the final fee "awarded" petitioner, the District Court gave weight to the fact that the Social Security review "* * * did not proceed beyond the district court level * * *" (Order Jan. 1, 1967, App. No. 7), indicating a quantum, hind-sight determination of a fair or reasonable fee quite at variance with the approach from which contingent fee contracts are entered before litigation commences and the outcome is determined.

The American Bar Foundation, the research affiliate of the American Bar Association, has recently completed a study report of contingent fees and their part in the administration of justice today, which has been published in book form entitled *Contingent Fees for Legal Services* by F. B. MacKinnon.*

On pages 159-60 the report states:

> "The fact of contingency itself does not work to the financial disadvantage of an individual client in a particular case. Most clients regard the principle of 'no recovery-no fee' as fair and desirable. But critics argue that many contingent fee contracts overprice the speculative character of the arrangement and that occasional losses are more than offset by the high rate paid on recoveries. The claim that contingent fees are excessive assumes the existence of a percentage rate so high as to give the lawyer an 'unfair' over-all return for his legal services on all cases, won or lost.
>
> "Certain difficulties present themselves immediately when we attempt to answer the general question, 'Are contingent fees excessive?' Since the actual fee is a product of the fee rate and the recovery to which it is applied, it is difficult to speak of 'fairness' of fees solely in terms of the rate, although this is done fairly often, e.g., 'a 50% fee is unreasonable.' The speaker must be making an unstated assumption about the size of the average recovery, the average amount of legal work, and the average risk of no recovery, all of which, with the rate, are factors in deciding 'fairness.' "

*1964, Aldine Publishing Company, Chicago, Illinois.

On page 182, it is said:

"Taken as a whole, the problem is essentially one of assessing the 'fairness' of a fee which is out of proportion to the work done on a particular case. However, when this fee is put with many smaller, compensatory fees, with noncompensatory fees on fully tried, difficult cases, and with instances of no recovery, it contributes to a picture of legal services which are not as a whole unreasonably priced, performed by a bar with a modest average income.

"From the point of view of the individual lawyer, it appears that to earn a reasonably high income he must not only charge a contingent fee which takes account of the risk of no recovery at trials but must also handle a good proportion of moderate-sized claims which are settled at an early stage of the proceedings, when the risk of loss is small.

"Part of the difficulty of the problem of judging the fairness of the contingent fee system in personal injury litigation arises from the existence of two different principles of 'fair' pricing. On one hand, if the fee in the individual case is examined according to the usual methods of measuring the value of legal services, any recovery by the lawyer over that value is 'unfair.' This aspect of the matter is strengthened by the tradition of the legal profession to deal with each client's case as a unique transaction. And, because the client will usually not ever have more than one personal injury case, it is not possible to argue, as to him, that the fees will average out at a fair figure.

"On the other hand, when the mass of cases is taken as a whole, the idea of using overcharges to some clients to offset undercharges to others does not seem an unfair way to support

> a system of providing competent legal services to clients who need them, assuming there is no feasible alternative system."

On page 210 of the report, the author says that:

> "Methods of financing litigation at minimum cost to the claimant other than the contingent fee have been described, including plans based upon government support or private insurance plans. However, it would appear that in this country financial help by a lawyer in the form of legal services (and to a more limited extent advancement for other costs and expenses) on a private, individual basis under a contingent fee contract is the prevailing preferred arrangement."

In several Social Security cases decided before 1965, federal courts had held that the matter of fee determination was purely a matter of contract between the parties, if competent adults, with which they would not interfere. *Carroll* v. *Celebrezze*, (N.D. Iowa-1964) 228 F.Supp. 24, *Castille* v. *Sect. H.E. & W.*, *supra.*

After such a contract is entered between competent adults, it is entitled to respect until challenged by proof of fraud or overreaching. In *Baltimore & Ohio Southwestern Railway Co.* v. *Voigt*, 176 U.S. 498, 44 L.Ed. 560, 565, the following was quoted with approval:

> " 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting,

> and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract.'"

No fraud or reprehensible conduct on petitioner's part has been shown. The District Court began by finding that the 50% contingent fee contract was "unreasonable on its face" (Order to Show Cause, App. No. 2). The District Court's final order (App. No. 7) found that the review proceeding "was merely a routine review challenging the action of the Secretary of Health, Education and Welfare * * * that Hamilton was not represented by respondent at the administrative level nor was it necessary for counsel to proceed beyond the district court level inasmuch as the government abandoned its appeal in this case. * * * There is nothing in the record to indicate that Hamilton's case presented any undue or unique problems for counsel."

It is submitted that such a state of facts—although perhaps indicating that $3,290.00 plus whatever may be awarded on quantum meruit from the children may appear too large a fee in this one case on hind-sight—does not present such a picture of fraud or overreaching from the standpoint of a contingent fee contract at the time it was entered between the attorney and the competent adult client as to warrant interference with a prior, half finished proceeding on the same subject before a competent state tribunal, an injunction against an officer of the court by summary proceeding initiated by the District Court alone and the cancellation of an otherwise binding contract of

employment between an attorney and a competent adult.

WHEREFORE your petitioner prays that a writ of certiorari may issue under the seal of this court directed to the Court of Appeals for the Fourth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceeding of the said Circuit Court and of the District Court for the Southern District of West Virginia had in the case numbered and entitled on its docket No. 11,231 *In re*: *Clay S. Crouse, Appellant,* and *John W. Gardner, Secretary of Health, Education and Welfare, Intervenor,* (*Hamilton* v. *Celebrezze,* Beckley Civil Action No. 264) *Appellee,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgments herein of said Circuit Court of Appeals and District Court be reversed by the court; and for such further relief as to this court may seem proper.

Dated October 11, 1967.

CLAY S. CROUSE,

Petitioner and Member of the Bar of the Supreme Court of the United States

Heaberlin Building
Beckley, West Virginia

LEE M. KENNA, Of Counsel
808 Security Building
Charleston, West Virginia

APPENDIX NO. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

IN RE: CLAY S. CROUSE — CIVIL ACTION
(Hamilton v. Celebrezze) — No. 3033
(Beckley Civil Action No. 264)

FACTUAL STATEMENT BEFORE THE CASE OF CROUSE VS. HAMILTON WAS INSTITUTED IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

After the oral argument in the Hamilton case in Beckley, West Virginia, on August 16, 1961, Hamilton made numerous calls at my office with reference to when Judge Field would render a decision. My secretary and I explained to him the delay in appointing a Judge to fill the vacancy of Judge Moore, and that it caused a backlog of cases to "pile up"; that Judge Field was frequently called to the U. S. Circuit Court to sit as a Circuit Judge, and other reasons that I could think of causing the delay. The delay was explained over and over again by me and my secretary to Mr. Hamilton on many occasions.

When Judge Field held his next term of Court here, Hamilton learned about it through the newspapers and made more frequent visits to my office inquiring the date when Judge Field would be here. Hamilton made numerous threats such as: "When he comes here, something is going to be done one way or another." Those threats were repeated on three or four occasions. I got

suspicious and called the matter to the attention of the U. S. Marshal, and told him that he knew what his duties were, and I wanted Judge Field to have such protection as he thought was necessary. The Marshal informed me that he did not know Hamilton. I told him that Hamilton would be in my office at a specific time, and that I wanted a Marshal to be at my office at that time; pretend to give me some information with reference to a case, and posted my secretary to admit the Marshal to my office while I was talking to Hamilton. That was done, and I introduced the Marshal to Hamilton. I feel sure that Hamilton was suspicious of something and nothing happened. Judge Field knows about this. I told him that it was my opinion, based upon the law and decisions previously rendered by Judge Field, that Judge Field would apply the same law to his case, and that he would get a favorable decision. Hamilton then told me, that he and his two boys were in need, and asked me to loan him Fifty Dollars ($50.00). I told him at the time, that I had heard from some of his neighbors that he would not pay me anything if he won his case. He became very angry and said that "I would see," or words to that effect. I advanced him other sums of money after that upon the basis of my expressed belief that a court decision would be favorable; upon his representations that he would pay me when he received his back payment money, and that he would refrain from approaching Judge Field.

Mr. Hamilton got his Certificate of Award, dated the 19th of June, 1963, showing the amount of money that he would receive, and also showing the amount of money that he would receive as father of his two boys, with a statement that he would receive the money for

his wife later. His wife died while the case was pending, and he received the amount due her up to the time of her death. That amount was One Thousand Nine Hundred Sixty-two Dollars ($1,962.00). The total amount that he received in accrued payments was Thirteen Thousand Nine Hundred Seventy-six Dollars ($13,976.00).

His neighbors told me that he was writing checks and did not intend to pay me. They were very indignant about it. They also told me that he had bought three automobiles, and that his children were getting very little out of the money. Mr. Hamilton's brother told me that "getting all of that money at one time was the worst thing that ever happened to Clarence."

I instituted suit against Hamilton, caused an order of attachment to be issued on funds in the bank in the name of Clarence Hamilton. I learned that he had no account in his name, but had made a deposit in the sum of Eight Thousand Dollars ($8,000.00) on savings account in the name of his two boys. I instituted another civil action and made the two boys parties because of the status of the bank deposit, and caused an order of attachment to be issued upon the ground that the debt to me upon contract was entered into with intent to defraud, and that a fraud was perpetrated.

After the second suit was instituted my secretary contacted me and told me that Mr. Hamilton was in the office and wanted to settle the case. On my way to the office I met Attorney Joseph Luchini and requested him to represent Mr. Hamilton. I came to the office with Mr. Luchini. I explained the situation

to both Hamilton and Luchini in this manner: That I understood that Mr. Hamilton wanted to settle the case pending in court; that Mr. Hamilton could not settle the case on account of infants being defendants, and that a court proceeding was necessary. I explained to both Mr. Luchini and Mr. Hamilton that Mr. Hamilton's money was tied up in the bank, and that Mr. Hamilton did not have the money available with which to pay counsel fees and costs; that I would give the attorney my check, payable to Mr. Hamilton for the services in the sum of Two Hundred Fifty Dollars ($250.00), which was agreed upon, and that when the case was settled, that Mr. Hamilton could pay Mr. Luchini and return my check after the case was settled and Mr. Hamilton's money was released; all of which was agreed upon, including the amount of settlement of Five Thousand Dollars ($5,000.00) for all my services. Mr. Luchini prepared all of the papers for settlement. Mr. Hamilton refused to go through with the proceeding; refused to pay Mr. Luchini anything, and Mr. Luchini instituted a suit before a Justice of the Peace for his fee.

After Mr. Hamilton got his money, he never at any other time contacted me with reference to payment of counsel fees, sums of money advanced to him by me, or expenses in the prosecution of the civil action. During the delay period and prior to the civil action, Hamilton and his family were supported by the Department of Public Assistance. His accrued payments and what he will be entitled to receive in the future will be approximately Forty-three Thousand Four Hundred Forty-two Dollars ($43,442.00).

CLAY S. CROUSE

STATE OF WEST VIRGINIA,
COUNTY OF RALEIGH, TO-WIT:

Clay S. Crouse, whose name is signed to the foregoing affidavit, after being first duly sworn, says that the facts and statements therein contained are true, except in so far as they are therein stated to be upon information and belief, and that in so far as they are therein stated to be upon information, he believes them to be true.

CLAY S. CROUSE

Taken, subscribed and sworn to by Clay S. Crouse, this 22nd day of May, 1964.

My commission expires: May 12, 1973.

LILLIAN JUSTICE PERRY
Notary Public, Raleigh County,
West Virginia.

APPENDIX NO. 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

IN RE: CLAY S. CROUSE — CIVIL ACTION
(Hamilton v. Celebrezze) — No. 3033
(Beckley Civil Action No. 264)

It appearing that Clay S. Crouse, an attorney duly admitted to practice before this Court, instituted an action in the United States District Court for the

Southern District of West Virginia in which he represented the plaintiff, Clarence Hamilton, against Anthony J. Celebrezze, Secretary of Health, Education, and Welfare, which action was instituted on February 3, 1961. It further appearing that by order entered in said action on April 19, 1963, the defendant Secretary was directed to grant to the plaintiff therein a period of disability together with disability benefits as provided for under the provisions of Sections 216(i) and 223 of the Social Security Act. It further appearing that pursuant to that order an initial payment in the amount of $6,582.00 was made to Clarence Hamilton, and also an initial payment in the aggregate amount of $5,432.00 was made to the children of said Clarence Hamilton.

It further appears that the said Clay S. Crouse entered into a contract of employment with Clarence Hamilton, which contract provided that the said Clay S. Crouse was to receive as an attorney fee fifty (50%) per cent of the initial amount recovered in said action against the Secretary. It further appears that on July 10, 1963, the said Clay S. Crouse instituted an action against Clarence Hamilton and the minor children of said Clarence Hamilton in the Circuit Court of Raleigh County at Beckley, West Virginia, the purpose of which action was to enforce said contract and recover the sum of $6,070.00 for legal services rendered by the said Clay S. Crouse pursuant to such employment contract. It further appears that incident to this latter action the said Clay S. Crouse caused an attachment to issue on the bank accounts of said Clarence Hamilton and/or the minor children, defendants therein, which accounts are maintained in the Whitesville State Bank at Whitesville, West Vir-

ginia. It further appears that by order entered in said action on April 21, 1964, by the Honorable Norman Knapp, Judge, judgment was rendered in favor of the said Clay S. Crouse for the sum of $3,291.00, which order further provided that Clay S. Crouse should have judgment against the infant children, defendants therein, in an amount thereafter to be fixed by the Honorable Norman Knapp, Judge of the Circuit Court of Raleigh County, West Virginia.

This Court being of the opinion that the amount recovered or paid pursuant to the order entered in the United States District Court for the Southern District of West Virginia in the said action of Clarence Hamilton v. Anthony J. Celebrezze, Secretary of Health, Education and Welfare, represented a disbursement of federal funds to carry out the purposes of the Social Security Administration and rested under the exclusive jurisdiction of this Court; and the Court being of the further opinion that this Court has jurisdiction and authority to regulate the fees and otherwise investigate the employment contracts of attorneys practicing before the bar of this Court and representing clients in actions incident to the Social Security program; and

Whereas, it further appears that the amount of the fee which the said Clay S. Crouse alleges to be due under the employment contract, the collection of which he seeks to enforce by virtue of the judgment obtained in the Circuit Court of Raleigh County, West Virginia, as aforesaid, is unreasonable on its face and is contrary to the purposes of the Social Security Act and the administration thereof;

IT IS THEREFORE ORDERED that the said Clay S. Crouse do appear before the bar of this Court at 10:00 o'clock A.M. on Thursday, the 14th day of May, 1964, to show cause why this Court should not enter an order to enjoin him from collecting said attorney fee, enforcing the judgment obtained by him in the Circuit Court of Raleigh County, West Virginia, proceeding under the attachment against the Whitesville Bank, or taking any other steps to collect any sum under the said employment agreement until the same has been approved by this Court.

IT IS FURTHER ORDERED that the Clerk of this Court deliver to the United States Marshal a certified copy hereof to be served forthwith upon the following:

Clay S. Crouse
Attorney at Law
Haeberlin Building
Beckley, West Virginia

Clarence Hamilton
Box 25
Colcord, West Virginia

United States Attorney
Rm. 4006, U. S. Courthouse
500 Quarrier Street
Charleston, West Virginia
Secretary of Department of Health,
Education, and Welfare
Washington, D. C.

by mailing a copy of said order to the
Honorable Bernard V. McCusty
Regional Attorney
Department of Health, Education, and Welfare
700 East Jefferson Street
Charlottesville, Virginia

DATED this 28th day of April, 1964.

/s/ JOHN A. FIELD, JR.
United States District Judge

APPENDIX NO. 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

IN RE: CLAY S. CROUSE (Hamilton v. Celebrezze) (Beckley Civil Action No. 264) — CIVIL ACTION No. 3033

Heard before the Honorable John A. Field, Jr., United States District Judge, on the 14th day of May, 1964.

APPEARANCES:

Peters, Merricks, Leslie, Kenna & Mohler, by Mr. Lee M. Kenna, counsel for Clay S. Crouse
Mr. Robert Abbott, appearing as amicus curiae

THE COURT: We have here this morning a proceeding 3033 in re Clay S. Crouse which grows out of a Social Security case, Civil Action Number 264, Ham-

ilton versus Celezrezze. The order directs that Mr. Crouse appear here this morning and show cause why the Court should not enter an order to enjoin him from collecting an attorney fee in regard to this case, and also to enjoin him from enforcing judgment which he has obtained in Judge Knapp's court up in Beckley, and also why this Court should not enjoin him from proceeding under an attachment which issued against the account of either Hamilton and/or his infant children in the Whitesville bank.

This order was entered by the Court sui sponte, so to speak; there was no adversary appearance. The matter came to my attention really through a newspaper article about the proceedings in Beckley.

I have some awareness and some experience with the work that is done in these various Social Security reviews, and quite frankly in my opinion on the face of it I felt that it was an unreasonable fee, and feeling that way—while certainly it is not a pleasant thing for a Court to call any attorney before the bar to explain any arrangement between him and his client—I think there do exist in these Social Security cases circumstances which to my mind require that the Court inquire into these things.

Mr. Kenna, if you want to take any steps now to either point out to the Court that you feel I am in error in initiating this matter this morning or anything that you feel would justify the position of Mr. Crouse, I will be glad to hear you.

First of all, let me say I have certified copies of the pleadings and the orders which were entered in

Civil Action 1625 in the Circuit Court of Raleigh County in the case of Clay S. Crouse versus Clarence Hamilton, Donnie Lee Hamilton and David Clarence Hamilton, and they will be filed as a part of the record here this morning.

MR. KENNA: If your honor please, I would like permission to file a motion to dismiss and a brief in support of that motion. I will explain rather briefly at the moment—

THE COURT: May I inquire first of all before you get into your argument—

MR. KENNA: I hadn't intended to argue at the moment.

THE COURT: Is this matter in status quo? Have any moneys been paid to Mr. Crouse?

MR. KENNA: I think not, and I think the Court may rest assured Mr. Crouse will hold it in status quo until this Court will determine the next step. I might explain this, if the Court please. I think the Court's file does not show that after the Court's order to show cause the defendants in the Beckley court, in the Raleigh County Court, filed a motion asking that court to reverse itself or to award a new trial. That has been done. To that extent it is not in status quo.

If the Court please, the pleading which has been filed is a motion to dismiss on the grounds that this Court has no jurisdiction of this matter, that there is another action pending which, of course, the Court is aware of. As the Court has pointed out, this not being

essentially—at the moment, at least—an adversary proceeding, puts the defendant in a little bit of an unusual and difficult position.

The brief which I have filed we would like the Court to study, of course. However, because that brief we think shows pretty clearly that the Court should not take jurisdiction of this matter, at this time we think that for the Court's benefit as well as for ours it would be better if we could have some adversary whom we could argue with and who could brief it on the other side and give us a chance to see the authorities and see what we think is wrong with their authorities. The Court is familiar with that traditional way of presenting questions to the Court. I think it would help not only the Court but ourselves. We don't want to argue with the Court.

THE COURT: You had better argue with the Court.

MR. KENNA: We expect to argue before the Court rather than with the Court, if you will permit me to make a distinction. For that reason we will do whatever the Court desires, but we would like to set this matter down for argument on these questions we have raised in the brief at a later date.

THE COURT: What questions have you raised?

MR. KENNA: For instance, this brief first of all is primarily designed to show the Court that there is no jurisdiction, that the Court should not take jurisdiction. If it has jurisdiction, it is concurrent; it has already been taken by the Raleigh County Circuit Court.

To put it candidly, all lawyers—and Mr. Crouse is certainly no exception—have a very high regard for the opinion of this Court. We have also gone into some argument as to the Court's feeling that the fifty per cent retainer or fifty per cent contingent fee, fifty per cent of the initial recovery was unreasonable on its face. That is a part of this brief.

Beyond that, however, the true burden of the brief is a jurisdictional one and I think I have in the past week been able to discover authorities which are important enough and pertinent enough so that the Court I believe will see that there is not only a grave question but I think no question at all of jurisdiction on the grounds of original jurisdiction: first of all there is no diversity; secondly the ancillary jurisdiction of the Court might have been exercised in the Celebrezze case.

It is admitted while the Celebrezze case was pending this Court had jurisdiction of ancillary matters such as attorneys' fees. Our position is essentially that the Celebrezze case was discharged, was paid off, and this case is a separate proceeding and the Court has no ancillary jurisdiction and no nondiverse original jurisdiction.

I think for the Court's benefit as well as for ours I would like the Court to read the brief prior to argument, if the Court has time. I would also like to have the questions briefed on the other side if anybody is interested in it so we can see what I may have missed. I haven't found anything that I think is important on the other side of the case.

THE COURT: Let me ask you this, Mr. Kenna: aside from the contract Mr. Crouse had with Clarence Hamilton, he had no contract with these infants?

MR. KENNA: We will for the sake of argument admit that at the moment.

THE COURT: We have a case in the 4th Circuit indicating in a Celebrezze case, as in any other case, the Court has inherent authority, as it has in all cases, to protect or authorize—in this case the Court went so far as to authorize attorney fees in respect to the interest of the infants. Don't you think that the proceeding should have been in this Court instead of Circuit Court?

MR. KENNA: I think that's true, but when Mr. Crouse understood he would have to bring suit it was too late to bring it to this Court.

THE COURT: Don't you think he could have come in with a motion asking the Court to reopen it and putting the matter before this Court?

MR. KENNA: I don't know about reopening it. I do think this Court had no jurisdiction of an original suit on the contract.

THE COURT: Don't you think that a court has inherent authority to monitor contingent fees in cases before it?

MR. KENNA: Before it, yes, sir, I do; not if they are not before it.

THE COURT: The thrust of your argument is that because the primary case of Hamilton versus Celebrezze was finalized by an order reversing the secretary and directing him to pay benefits—

MR. KENNA: And the benefits were paid.

THE COURT: —and the benefits were paid pursuant to that order, it is your argument that the Court has no further authority over the fees?

MR. KENNA: Has no ancillary jurisdiction.

THE COURT: There are two reasons I did this. First of all, quite frankly, it occurred to me that the amount was unreasonable. I know the minimal work that goes into these Social Security reviews.

Another thing that impressed me, this Court, as you know, runs way behind in its disposition of cases, and while from the human element I am inclined to think that they should have the primary call on the Court's time, as a matter of practice they are shoved off and this Hamilton case reposed in the bosom of the Court far too long. But under such a contract the inability of the Court to dispose of the case every month builds up a fifty per cent attorney fee on whatever is accruing during that month until the time of the payment of the initial award—no relation whatever to the work that Mr. Crouse did, and I simply myself as Judge of this Court feel that I would have been derelict to let it pass unnoticed.

I am not saying I am closing my mind to your brief. I will be happy to read it and go over it, and I will say quite frankly there are serious misgivings in my own mind as to this Court's jurisdiction, but I want the 4th Circuit Court of Appeals to tell me that an attorney is entitled to take $6,000 out of an initial award like this and tell me that I am powerless to do anything about it.

MR. KENNA: I wish the Court would read the brief before you make that flat statement.

THE COURT: Strangely enough the Social Security Administration and the Department of Justice have taken the stand that the courts have nothing to do and should not be entitled or have no authority to authorize a payment, and I guess it would carry with it impliedly no right to monitor the payment.

Frankly, I think if the courts are going to have the burden of these Social Security reviews placed on them, then I think the Social Security Administration should sponsor an amendment to the law giving the courts in every case the right to authorize it. I can see nothing wrong with that, but certainly the right to review the fees of attorneys in those cases in which awards are made.

MR. KENNA: For what it may be worth to the Court, I cannot think the Court does not have that power now as long as the review is pending before the Court. I also want to point out to the Court in this brief our position is not that no court should review it. With infants involved, we admit it should be reviewed and the fee for the adult should be reviewed.

Our only point is that it was brought up in the Circuit Court of Raleigh County and that court has jurisdiction of it now in our opinion. They are not through with it. There is nothing that has been shown that they are not capable of handling it. At the time it was brought to the attention of Mr. Crouse that he was not going to be paid there was no diversity of citizenship. I don't think there was any original jurisdiction.

I don't think he could have brought it before this Court unless he could have come in and asked for it to be reopened. Apparently the Celebrezze attorneys would have opposed that.

THE COURT: It is quite possible if he had come in here they would have taken the position that I couldn't authorize a fee.

MR. KENNA: All I am trying to say, Mr. Crouse has taken it into court. Perhaps it was not taken into court voluntarily but it is in court and a perfectly competent court is handling it. We are not trying to compare the ability of the Circuit Court with this Court.

THE COURT: No; surely not.

MR. KENNA: It may be reversed, but we submit to the Court that it is not orderly procedure for one court to order participants before another court which has jurisdiction to stop down there and to come up here and explain it here.

We would be happy to explain it to your honor in all detail privately. We would like to satisfy you individually, but our position is that it is not orderly and that the legal way of explaining it is that there is no jurisdiction and there is another action pending.

It is very desirable—and where infants are concerned it is imperative; it has to be done—but we submit it is being done in a perfectly capable court that has jurisdiction and Hamilton is represented by perfectly competent attorneys in the Raleigh County Court. There is no advantage being taken of him

there, no intention of taking advantage of him. There is no intention to take advantage of anybody in this matter.

THE COURT: All right, sir. Mr. Abbott, I see you are here this morning. I am advised you represented Mr. Hamilton in the Raleigh County case. Is there anything you would like to state?

MR. ABBOTT: Your honor, I would like to say Mr. Kenna's statement was perfectly correct, and we did file a motion for mistrial in the Circuit Court of Raleigh County, and that action was taken after the order was issued and served upon Mr. Crouse and Mr. Hamilton. However, our time was going by, the ten days prescribed by the rules, and we felt it necessary to take that action. I have a copy of the notice and motion I would like to file with the Court to make this record complete.

The position was taken according to Mr. Kenna's statement that some court should pass upon the reasonableness of the fee. I am not directly traversing his statement, but I do think from the outset it has been the defendants who have tried to get this matter before the court.

It was presented as a simple collection on a contractual relationship, both as to the adult defendant and as to the infant defendants. I think I should make that clear. They have not taken the position that a court opinion as to the reasonableness of the fee was a prerequisite for collection, even in the case of the infants.

I might also tell the Court—and this may be clear already to your honor—that the court directed a verdict as to the adult defendant for the amount required, and in doing so based it on an express contract of employment which was a simple contractual relationship between an adult client and an adult attorney.

As to the children, he dismissed the jury and said that the court would decide the matter of the reasonableness of the fee. That's still in the bosom of the Circuit Court of Raleigh County and we were supposed to submit further evidence before this matter came on.

THE COURT: What was the basis for recovery against the children?

MR. ABBOTT: According to the plaintiff's contention it is a simple contractual relationship. We had set up an affirmative defense of infancy, and in all fairness I don't believe that the plaintiff submitted to the proposition that a court would have to pass on the reasonableness of that contract during the course of the trial.

The motion for a new trial, your honor, runs both to the action of the court in deciding that there was an express contract and taking it away from the jury on the question of the adult defendant, and it also runs to the court's action in dismissing the jury in passing upon the reasonableness of the fee as to the infants.

Your honor, Mr. Kenna stated he would feel better if someone would look into this on behalf of the defendant, the original defendant, Mr. Clarence Hamil-

ton, and his two co-defendants, the children. We would be glad to do that, examine the briefs filed, and if indicated file an opposing brief or render any help that we could to this Court.

THE COURT: Thank you, Mr. Abbott.

One reason, as a matter of fact, that I handled it in this way was that I didn't want it in the posture, Mr. Kenna, of an adversary proceeding which would seem to present a possibly unseemly conflict between this Court and Judge Knapp's Court.

The case presented to him, as Mr. Abbott stated, was merely a case of the plaintiff saying, "I have a contract; I am asking the Court to give me a judgment on it to enforce my contract."

The position I am taking toward it here is, does Mr. Crouse have an enforcible contract? The position I am taking is, is Mr. Crouse entitled to enforce such a contract in a Social Security case, in a case in this Court?

On the assurance of counsel that everything will remain in status quo, I will permit Mr. Abbott to appear as amicus curiae in this case. If you have a copy of the brief filed with the Court, Mr. Abbott, in two weeks or so if you want to file a reply to it, and after I have gone over the briefs we can arrange another hearing on this to give you a chance to argue the case in the light of information in the briefs.

In the meantime I am going to enter an all points order in the Southern District of West Virginia, and here again not knowing whether I have the power or

not, but certainly I am going to enter the order to preclude the possibility of a recurrence of this, that in all Social Security cases before any order which involves an award to a claimant is made that counsel for the claimant present to the Court particulars of his employment arrangement with the plaintiff, and the Court is going to pass on whether in all cases it is reasonable or not.

All right, gentlemen; if you will give Mr. Abbott a copy of the brief, and, Mr. Abbott, by June 1 if you could get me a reply as amicus curiae, and if you want to reply to that, Mr. Kenna, you may do so.

I, Betty Bratton, official reporter of the United States District Court for the Southern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of all the proceedings had in the hearing in re Clay S. Crouse on the 14th day of May, 1964, as reported by me in shorthand.

Given under my hand this 15th day of February, 1967.

APPENDIX NO. 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

IN RE: CLAY S. CROUSE
(Hamilton v. Celebrezze)
(Beckley Civil Action No. 264)

CIVIL ACTION
No. 3033

MEMORANDUM OPINION

Clay S. Crouse, an attorney duly admitted to practice in this Court, instituted an action in the Beckley division on February 3, 1961, in which he represented the plaintiff, Clarence Hamilton, against Anthony J. Celebrezze, Secretary of Health, Education and Welfare. The object of the suit was to obtain a review of the Secretary's action in denying to plaintiff a period of disability together with disability benefits as provided for under the provisions of Sections 216(i) and 223 of the Social Security Act. The action was designated as Civil Action No. 264 on the Beckley docket, and by order entered therein on April 19, 1963, the action of the Secretary was reversed and he was directed to grant both the period of disability and the benefits for which the plaintiff had applied. Pursuant to that order Hamilton received accrued past-due benefits in the amount of $6,582.00 and $116.00 per month for life. Also as a result of the order Hamilton's two infant children received accrued benefits amounting to $5,432.00 as well as certain monthly payments to continue until each attained the age of eighteen years. Additionally, Hamilton's wife was to receive accrued

benefits in the sum of $1,962.00. She, however, died before these benefits were paid.

On July 10, 1963, Crouse filed an action in the Circuit Court of Raleigh County, West Virginia, against Hamilton and his two infant children, alleging that he and Hamilton entered into a contract relative to the Social Security case by the terms of which Crouse was to receive as his fee fifty per cent of the initial payments received by Hamilton, for himself, his wife or his children. Crouse asked for judgment in the amount of $6,070.00 being fifty per cent of the aggregate of the initial payments to Hamilton and the children. Incident to this action, Crouse attached $6,070.00 of a bank account standing in the name of the infant children in the Whitesville State Bank. On April 21, 1964, an order was entered in the Raleigh County action granting Crouse a judgment against Hamilton in the amount of $3,291.00. The order further provided that Crouse should recover from the infant defendants an amount to be fixed by the Court after a hearing on the reasonableness of the contract for legal services rendered said infants.

Shortly after the entry of the judgment order in Raleigh County, I was advised for the first time of these developments, and on April 28, 1964, I entered an order requiring Crouse to appear in this Court on May 14, 1964, "* * * to show cause why this Court should not enter an order to enjoin him from collecting said attorney fee, enforcing the judgment obtained by him in the Circuit Court of Raleigh County, West Virginia, proceeding under the attachment against the Whitesville Bank, or taking any other steps to collect any sum under the said employment agreement until

the same has been approved by this Court." The order contained a recital of the proceedings in Raleigh County and a statement that I considered the amount of the fee unreasonable on its face and contrary to the purposes of the Social Security Act. A copy of that order is attached hereto as Appendix "A" to this opinion. On May 14, 1964, counsel for Crouse filed a motion to dismiss this proceeding on the grounds that this Court lacked jurisdiction of the subject matter, and that this Court should defer to the Circuit Court of Raleigh County which had acquired jurisdiction antecedent to this proceeding. Crouse and his counsel agreed not to proceed further in the state court action until the motion to dismiss was acted upon.

The thrust of Crouse's argument seems to be that the Raleigh County action was instituted to enforce the agreement between him and Hamilton; that no diversity or federal question existed and therefore the state court was the only forum properly available to him. Additionally he argues that since the state court had acquired jurisdiction this Court "should apply the generally recognized rules of comity and equitable abstention."

This controversy arose prior to the recent amendment of Section 206 of the Social Security Act, and it is true that it was generally accepted that the district courts had no authority to award attorney fees in social security reviews. See *Sheppard* v. *Flemming, etc.*, (S.D. W. Va. 1960), 189 F. Supp. 571. However, it is appropriate to observe that as far back as 1956 the Fourth Circuit recognized the authority of the courts to award attorney fees in the case of an infant in a social security review. *Folsom* v. *McDonald*, 237 F. 2d, 380. It is also interesting to note that the *Mc-*

Donald rationale was extended by the Fifth Circuit in early 1965 to cover attorney fees for representation of an adult Social Security claimant. *Celebrezze* v. *Sparks*, 342 F. 2d 286. Certainly, insofar as the infant parties are concerned, Crouse could have asked this Court for the allowance of a reasonable attorney fee in this case. This forum was not only available for that purpose but logically was the most appropriate forum. In this connection the following language in the *McDonald* opinion is pertinent (237 F. 2d at 382):

> "* * * If counsel for the infant plaintiff are to be paid for their services, their compensation must be determined by some court and must be paid out of the fund recovered by their services. There is no more fitting manner in which this could be done than for the court under whose direction the guardian ad litem acted in maintaining the suit to fix the fees and order them to be paid from the recovery which they have secured."

In any event, to cast this proceeding in the posture of a conflict in jurisdiction between this Court and the Circuit Court of Raleigh County elides the real issue. The issue here is not a contest of jurisdiction between the state and federal court to enforce a contract between the parties. Rather, the issue is whether this Court, in the exercise of its general authority over the professional conduct of its attorneys, as officers of the court, towards their clients, has jurisdiction to deal summarily with the situation here presented. In my opinion such jurisdiction does exist. See *In re Debbins*, (E.D. Mich. 1931), 53 F. 2d 1018. This authority and jurisdiction was stated in *Theard* v. *United States*, (1956) 354 U. S. 278, as follows (at 281):

> "* * * The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. 'Membership in the bar is a privilege burdened with conditions' (*Matter of Rouss*, [221 N. Y. 81, 84, 116 N. E. 782, 783]). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470-471, 162 N. E. 487, 489."

In holding that the district court had inherent authority to award an attorney fee in Social Security cases, in *Celebrezze* v. *Sparks*, *supra*, the Court observed (342 F. 2d at 289):

> "* * * We may add that the intervention of the district courts in these cases to fix and allow reasonable counsel fees may well protect indigent claimants from oppressive and improvident arrangements."

Such an observation is equally applicable to the situation here present, and it is my conclusion that this Court in which the subject litigation was conducted can and should exercise its authority over the professional conduct of Crouse towards the indigent claimant and his infant children in regard to the reasonableness of his attorney fee.

The motion to dismiss will be denied, and the matter set for hearing as to the reasonableness of any fee or fees to be allowed.

JOHN A. FIELD, JR.
United States District Judge

Dated October 25, 1965

APPENDIX NO. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

IN RE: CLAY S. CROUSE — CIVIL ACTION
(Hamilton v. Celebrezze) — No. 3033
(Beckley Civil Action No. 264)

On a previous day, to-wit, the 16th day of September, 1964, this cause came on to be heard upon the order to show cause issued herein on April 28, 1964, the motion to dismiss for lack of jurisdiction and another action pending made by Clay S. Crouse on May 14, 1964, and the briefs and argument of counsel; in consideration of all of which the court is of the opinion and hereby holds that jurisdiction to hear and determine the matter raised by said order to show cause is vested in and should be exercised by this court and the motion to dismiss is denied for the reasons set forth in the court's memorandum of opinion dated October 25, 1965, a copy of which is hereby filed and made a part of the record in this proceeding.

And counsel for Clay S. Crouse thereupon moved that the court certify an immediate appeal under 28 U.S.C. §1292(b) of the questions raised by Crouse's motion to dismiss, which after mature consideration, the court doth deny.

Clay S. Crouse having represented through counsel that he desires to test the court's opinion by petition to the Court of Appeals seeking a writ of prohibition, the Court will postpone setting a date for hearing evidence for a period of sixty days after the entry of this order.

Enter, this 10th day of January, 1966.

/s/ JOHN A. FIELD, JR.

Judge, United States District Court, Southern District of West Virginia

APPENDIX NO. 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston, West Virginia 25329

Chambers of
John A. Field, Jr., District Judge

October 5, 1966

Lee M. Kenna, Esquire
Attorney at Law
Security Building
Charleston
West Virginia 25301

W. Robert Abbot, Esquire
Attorney at Law
P. O. Box 356
Fayetteville
West Virginia

Civil Action No. 3033
In re: Clay S. Crouse

Gentlemen:

On January 10, 1966, an order was entered in this proceeding pursuant to a memorandum opinion which had been filed on October 25, 1965, denying the motion of the respondent to dismiss this case for lack of jurisdiction, and the order further postponed the date for hearing evidence as to the reasonableness of any fee or fees to be allowed the respondent for a period of 60 days to permit respondent to test the Court's decision by petition for a writ of prohibition in the Fourth Circuit Court of Appeals. The petition for this writ was denied by the Court of Appeals and the hearing as to the reasonableness of the fee was held in Beckley on September 15, 1966. At that time counsel for the respondent did not present any evidence but elected to stand on the record in this proceeding including the record in Civil Action No. 264, Clarence Hamilton v. Celebrezze, as well as the record of the proceedings in the case of Clay S. Crouse v. Clarence Hamilton et al. pending in the Circuit Court of Raleigh County and indicated in that Court as Civil Action No. 1625.

As set forth in my memorandum opinion, Hamilton received accrued benefits in Civil Action No. 264 in

the amount of $6,582, and his infant children received accrued benefits in the amount of $5,432. Hamilton's wife also was to receive benefits in the amount of $1,962 but she, however, died before such benefits were paid. In the Raleigh County action, Crouse obtained judgment against Hamilton in the amount of $3,291, and the Court deferred further action with respect to any fee which Crouse might recover from the infant defendants until a hearing might be held on that aspect of the case. This hearing in the Circuit Court of Raleigh County was not held inasmuch as the present proceeding intervened.

A reveiw of the record in Civil Action No. 264 indicates that it was merely a routine review challenging the action of the Secretary of Health, Education and Welfare under the appropriate review statute (Section 205(g) of the Social Security Act). The record further indicates that Hamilton was not represented by respondent at the administrative level nor was it necessary for counsel to proceed beyond the district court level inasmuch as the Government abandoned its appeal in this case.

While Civil Action No. 264 was terminated and this controversy arose prior to the amendment of Section 206 of the Social Security Act with respect to the allowance of attorney fees, nevertheless it occurs to me that the statutory maximum furnishes an appropriate criterion for the fee to be allowed in this proceeding. There is nothing in the record to indicate that Hamilton's case presented any undue or unique problems for counsel; and, under the circumstances, it is my finding that a fee of 25% of the amount of $6,582, being the accrued past due benefits received by Hamil-

ton, would be a reasonable fee for Clay S. Crouse, Hamilton's attorney in this case. Accordingly, counsel may prepare an order allowing Clay S. Crouse a fee in the amount of $1,645.50 and providing that Crouse remit any amount in excess of this allowance which he might otherwise obtain by virtue of the judgment or proceedings in Civil Action No. 1625 in the Circuit Court of Raleigh County, West Virginia. Counsel may incorporate this letter ruling by reference in such order.

Very truly yours,

JOHN A. FIELD, JR.
United States District Judge

Copy to
Clay S. Crouse, Esquire

APPENDIX NO. 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
At Charleston

IN RE: CLAY S. CROUSE (Hamilton v. Celebrezze) (Beckley Civil Action No. 264) — CIVIL ACTION No. 3033

On the 15th day of September, 1966, came the parties hereto, Clay S. Crouse, in person and by counsel, Lee M. Kenna, and Clarence Hamilton, Donnie Lee Hamilton and Clarence David Hamitlon, by counsel, W. Robert Abbot, at which time counsel for the respondent,

Clay S. Crouse, announced to the Court that it was not respondent's wish to present any evidence as to the reasonableness of the attorney's fee charged by respondent in the case of Clarence Hamilton vs. Celebrezze, Civil Action No. 264.

It appearing to the Court that Clarence Hamilton received accrued benefits in said Civil Action No. 264 in the amount of $6,582.00, Donnie Lee Hamilton and Clarence David Hamilton, the children of Clarence Hamilton, received accrued benefits in the amount of $5,432.00 as a result of their claim against the defendant in said proceeding, and an award was paid in the amount of $1,962.00 as benefits due Hamilton's deceased wife, (for which amount respondent has claimed no attorney's fees), and that respondent had obtained a judgment against Clarence Hamilton in the amount of $3,291.00 in the Circuit Court of Raleigh County, West Virginia, and that said Court had deferred a decision as to respondent's claim against the infant defendants in said proceeding, at which time the present proceeding intervened;

It further appearing to the Court that said Civil Action No. 264 did not proceed beyond the district court level and was a routine review challenging the action of the Secretary of Health, Education and Welfare in denying Social Security benefits to the said Clarence Hamilton and said infant children and that said case presented no undue or unique problems for counsel, the court rendered a decision in a memorandum opinion dated October 5, 1966, which opinion is incorporated by reference herein and in conformity therewith;

It is ORDERED that the respondent be awarded an attorney's fee in the amount of $1,645.50 in full satisfaction of all services rendered in the case of Clarence Hamilton vs. Celebrezze, Civil Action No. 264, and it is further ORDERED that respondent shall remit to the said Clarence Hamilton any amount in excess of said amount of $1,645.50 which he might otherwise obtain by virtue of the judgment or proceedings in Civil Action No. 1625 in the Circuit Court of Raleigh County, West Virginia.

To all of which Clay S. Crouse doth object, specifically reserving all rights he may have had at the institution of this proceeding to object to the jurisdiction of this Court and to the Courts proceeding in this matter in view of the pendency of the action between Clay S. Crouse and Clarence Hamilton, et al, before the Circuit Court of Raleigh County, West Virginia, referred to earlier in this proceeding.

It is further ORDERED that the records in the cases of Clarence Hamilton vs. Celebrezze, Civil Action No. 264, United States District Court, Southern District of West Virginia, and in the case of Clay S. Crouse vs. Hamilton, et al, Civil Action No. 1625, Circuit Court of Raleigh County, West Virginia, be, and the same are expressly made a part of the record in this proceeding.

Dated this the 19th day of January, 1967.

/s/ JOHN A. FIELD, JR.
Judge

APPENDIX NO. 8

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,231.

In re: Clay S. Crouse,
Appellant,

and

John W. Gardner,
Secretary of Health, Education and Welfare,
Intervenor, (Hamilton v. Celebrezze, Beckley
Civil Action No. 264)
Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.
John A. Field, Jr., District Judge.

(Argued June 22, 1967. Decided July 18, 1967.)
Before Haynsworth, Chief Judge, and Bryan and Craven, Circuit Judges.

Lee M. Kenna (Peters, Merricks, Leslie, Kenna & Mohler on brief) for Appellant, and William Kanter, Attorney, Department of Justice, (Carl Eardley, Acting Assistant Attorney General, and Kathryn H. Baldwin, Attorney, Department of Justice, and Milton J. Ferguson, United States Attorney, on brief) for Appellee.

PER CURIAM:

For reasons sufficiently appearing in the memorandum decision of the District Court, the judgment is affirmed.

Affirmed.